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In the Supreme Court of the United States

OCTOBER TERM, 1994

CITIZENS BANK OF MARYLAND, PETITIONER

v.

DAVID STRUMPF

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

GARY R. ALLEN
GARY D. GRAY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the creditor of a debtor in bankruptcy may withhold payment of a debt it owes to the debtor while the creditor seeks relief from the automatic stay to exercise its setoff rights.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statutory provisions involved	2
Statement	2
Argument	4
Conclusion	14
Appendix	1a

TABLE OF AUTHORITIES

Cases:

B.F. Goodrich Employees Federal Credit Union v. *Patterson*, 967 F.2d 505 (11th Cir. 1992)	6, 9, 11, 12
Baker v. *National City Bank of Cleveland*, 511 F.2d 1016 (6th Cir. 1975)	9
Bank of America v. *Edgins*, 36 B.R. 480 (Bankr. 9th Cir. 1984)	5, 12
Bank of Marin v. *England*, 385 U.S. 99 (1966)	11
Barnhill v. *Johnson*, 112 S. Ct. 1386 (1992)	11
Barrier v. *Marine Midland Trust Co.*, 284 A.2d 418 (Md. 1971)	10
Briggs, In re, 143 B.R. 438 (Bankr. E.D. Mich. 1992)	13
Campbell v. *United States*, 889 F.2d 658 (5th Cir. 1989), cert. denied, 495 U.S. 933 (1990)	12
Executive Assoc. v. *Southern Nat'l Bank*, 24 B.R. 171 (Bankr. S.D. Tex. 1982)	13
Flynn, In re, 143 B.R. 798 (Bankr. D.R.I. 1992)	13
Gazelle, Inc., In re, 17 B.R. 617 (Bankr. W.D. Wis. 1982)	13
Gifford, In re, 174 B.R. 231 (Bankr. W.D. Ky. 1994)	12
Horton Dairy, Inc. v. *United States*, 986 F.2d 286 (8th Cir. 1993)	9
Hudson v. *United States*, 168 B.R. 449 (Bankr. S.D. Ga. 1994)	13

Cases—Continued:

	Page
Kenny's Franchise Corp. v. *Central Fidelity Bank*, 22 B.R. 747 (W.D. Va. 1982)	12
Learn, In re, 95 B.R. 495 (Bankr. N.D. Ohio 1989)	13
Lough, In re, 163 B.R. 586 (Bankr. D. Idaho 1994)	11, 13
Midway Indus. Contractor, Inc., In re, 167 B.R. 139 (Bankr. N.D. Ill. 1994)	13
Moreira v. *Digital Employees Fed. Credit Union*, 173 B.R. 965 (Bankr. D. Mass. 1994)	12-13
National Bank v. *Air Atlanta*, 74 B.R. 426 (Bankr. N.D. Ga.), aff'd, 81 B.R. 724 (N.D. Ga. 1987)	13
Pittsburgh National Bank v. *United States*, 657 F.2d 36 (3d Cir. 1981)	8
Rio v. *Army Aviation Ctr. Fed. Credit Union*, 83 B.R. 138 (M.D. Ala. 1986)	12
Sisk v. *Saugus Bank & Trust Co. (In re Saugus Gen'l Hosp., Inc.)*, 698 F.2d 42 (1st Cir. 1983)	9
Small Business Administration v. *Rinehart*, 887 F.2d 165 (8th Cir. 1989)	2, 11-12
Stephenson v. *Salisbury*, 967 F.2d 1069 (5th Cir. 1992)	6, 12
Tavormina v. *ITT Commercial Fin. Corp. (In re Aquasport)*, 115 B.R. 720 (Bankr. S.D. Fla. 1990), aff'd, 155 B.R. 245 (S.D. Fla. 1992), aff'd, 985 F.2d 579 (11th Cir. 1993)	13
Teamsters Credit Union v. *Lee*, 40 B.R. 123 (Bankr. E.D. Mich. 1984)	13
Third Nat'l Bank v. *Carpenter*, 14 B.R. 405 (Bankr. M.D. Tenn. 1981)	13
United States v. *Bell Credit Union*, 860 F.2d 365 (10th Cir. 1988)	9
United States v. *Citizens & Southern Nat'l Bank*, 538 F.2d 1101 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977)	9
United States v. *Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991), cert. denied, 502 U.S. 1048 (1992)	12
United States v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992)	11

Cases—Continued:

	Page
United States v. *Norton*, 717 F.2d 767 (3d Cir. 1983)	2, 7, 8
United States v. *Reynolds*, 764 F.2d 1004 (4th Cir. 1985)	2, 7, 8, 10
United States v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983)	5
Weems v. *United States (In re Custom Ctr., Inc.)*, 163 B.R. 309 (Bankr. E.D. Tenn. 1994)	13
Williams v. *American Bank of the Mid-Cities*, 61 B.R. 567 (Bankr. N.D. Tex. 1986)	13
Woloschak Farms, In re, 74 B.R. 261 (Bankr. N.D. Ohio 1987), vacated, 109 B.R. 736 (N.D. Ohio 1989)	13

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:	
11 U.S.C. 106(a)	7
11 U.S.C. 362	5, 1a
11 U.S.C. 362(a)(3)	11
11 U.S.C. 362(a)(6)	11
11 U.S.C. 362(a)(7)	2, 4, 5, 6, 8, 11
11 U.S.C. 362(d)	7
11 U.S.C. 362(h)	7
11 U.S.C. 363	5, 10, 11, 2a
11 U.S.C. 363(a)	5
11 U.S.C. 363(c)(2)(B)	6, 10
11 U.S.C. 363(e)	5, 6
11 U.S.C. 502(d)	12
11 U.S.C. 506(a)	5, 6, 3a
11 U.S.C. 542	6, 11
11 U.S.C. 542(b)	4, 6, 7, 8, 10, 11, 3a
11 U.S.C. 553	4, 5, 6
11 U.S.C. 553(a)	5, 4a
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106	7
26 U.S.C. 6402(a)	9
31 U.S.C. 3716	10
31 U.S.C. 3728	10

Miscellaneous: Page

4 *Collier on Bankruptcy* (15th ed. 1994) 13
2 Lawrence P. King et al., *Collier on Bankruptcy* (2d ed. 1994) 5
Paul S. Groschadl, *"Freezing" the Debtor's Bank Account: A Violation of the Automatic Stay?*, 57 Am. Bankr. L.J. 75 (1983) 9

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INTEREST OF THE UNITED STATES

This case concerns whether, during the period that the creditor in a bankruptcy case is seeking relief from the automatic stay to exercise its setoff rights, the creditor may withhold payment of a debt owed to the debtor. This issue is of subtantial importance to the United States, whose agencies and instrumentalities are often creditors under federal programs involving loans, loan guarantees, contracts, assistance and benefit payments and tax collection activities. Indeed, two of the decisions upon which the court of appeals relied in the present case involved holdings that the United States violated the automatic stay by withholding a refund of overpaid taxes

for one year even though the debtor had a larger outstanding tax liability for a different year. Pet. App. 9, 10, citing *United States* v. *Reynolds*, 764 F.2d 1004 (4th Cir. 1985); *United States* v. *Norton*, 717 F.2d 767 (3d Cir. 1983). A third decision relied on by the court of appeals involved efforts of the Small Business Administration to offset its loan claim against crop payments due the debtor from the Department of Agriculture. Pet. App. 7, citing *Small Business Administration* v. *Rinehart*, 887 F.2d 165 (8th Cir. 1989).

As petitioner notes (Pet. 8-23), the lower courts have reached a variety of conflicting results in addressing this recurring issue. As a result, federal agencies face disparate treatment of identical claims arising under national programs. The United States therefore has a substantial interest in the resolution of this recurring conflict.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Bankruptcy Code are reprinted in the appendix to this brief.

STATEMENT

1. Petitioner is a bank conducting business in the State of Maryland. In 1989, petitioner loaned respondent approximately $5000. That loan was in default before respondent filed a petition for relief in bankruptcy under Chapter 13 in January 1991 (Pet. App. 3). Under Section 362 of the Bankruptcy Code, the filing of the petition in bankruptcy gave rise to an "automatic stay" of various types of activity by respondent's creditors. In particular, the filing stayed "the setoff of any debt owing to the debtor that arose before the commencement of the [bankruptcy] case." 11 U.S.C. 362(a)(7).

In October 1991, the bank moved for relief from the automatic stay in order to set off approximately $3200 then in respondent's checking account against the remaining balance that respondent owed on the loan. While the motion for relief from the stay was pending, the bank placed an "administrative hold" on the balance of approximately $3500 in respondent's checking account. The hold temporarily barred respondent from making withdrawals from the account. Respondent reacted to the bank's "administrative hold" by filing a motion in bankruptcy court seeking to have the bank held in contempt of the automatic stay (Pet. App. 4).

The bankruptcy court ruled on debtor's contempt motion before addressing the bank's prior motion for relief from the automatic stay. The court concluded that the bank's "administrative hold" on respondent's account represented a "setoff" in violation of the automatic stay and, as a sanction for violation of the stay, ordered the bank to pay actual and punitive damages and attorneys' fees to respondent (Pet. App. 34-36). At that time, the court reserved its ruling on the bank's motion for relief from the stay.

Nineteen days later, the bankruptcy court granted the bank's motion for relief from the stay and authorized the bank to set off respondent's remaining account balance against the unpaid loan. By that time, however, there was nothing left to set off because respondent had withdrawn all of his funds from the bank (Pet. App. 4-5).

2. The district court reversed the judgment holding the bank in violation of the automatic stay. The court concluded that the bank's temporary freeze of respondent's account during the period that the bank sought relief from the automatic stay was not a violation of the statute (Pet. App. 18-33).

3. The court of appeals reversed and reinstated the bankruptcy court judgment (Pet. App. 1-17). The court held that a creditor's administrative freeze of amounts subject to setoff is "tantamount" (*id.* at 9) to the exercise of the right of setoff and therefore violates 11 U.S.C. 362(a)(7). The court reasoned that its holding was compelled by "the clear and unambiguous language" of the statute, which prohibits any "setoff" during the automatic stay (Pet. App. 13-14). The court further stated that the bank's actions in freezing a debtor's accounts could substantially diminish the debtor's chances for successful rehabilitation (*id.* at 14-15). Concluding that the automatic stay had been violated by the bank, the court ordered reinstatement of the award of actual and punitive damages and attorneys' fees to respondent (*id.* at 15-16).

ARGUMENT

Section 362(a)(7) of the Bankruptcy Code provides an automatic stay of "the setoff" of any prepetition debt of the debtor by any creditor. 11 U.S.C. 362(a)(7). The court of appeals erred in this case in concluding that a "setoff" occurs whenever a creditor maintains the status quo by not turning over funds requested by the debtor. A "setoff" requires an affirmative act by the creditor; maintaining the status quo is not a "setoff." See pages 7-10, *infra*. Moreover, Sections 542(b) and 553 of the Bankruptcy Code expressly protect a creditor from the obligation to turn over funds owed to the debtor to the extent that the creditor claims a right of setoff. A creditor such as petitioner is not acting in contempt of the automatic stay by temporarily declining to pay to the debtor funds that the Bankruptcy Code expressly provides need not be paid. See pages 10-11, *infra*.

The decision in this case misapplies the interlocking set of Bankruptcy Code provisions that protect the setoff rights of bankruptcy creditors. In doing so, the court has enlarged the continuing disagreement that exists on the common, recurring question presented in this case. Review by this Court is needed to resolve this important conflict among the courts of appeals.

1. a. Several Sections of the Bankruptcy Code are implicated in this case. In order properly to understand the automatic stay of "the setoff" of prepetition debts under Section 362(a)(7) of the Bankruptcy Code, it is necessary also to consider other applicable provisions of that Code. In particular, Section 553 of the Code specifies that, with only two exceptions, the Bankruptcy Code "does not affect any right of a creditor to offset" prepetition debts. 11 U.S.C. 553(a). The two exceptions specified in Section 553 are the automatic stay of "the setoff" (under Section 362) and the limited right of the bankruptcy trustee to require payment of a debt secured by setoff by providing alternative, adequate protection for the setoff claim (under Section 363). 11 U.S.C. 553(a).[1] Subject only to those two exceptions, the

[1] Section 363 of the Bankruptcy Code permits a debtor in possession or trustee authorized to operate the debtor's business to "use, sell, or lease" property of the estate. Under that provision a debtor in possession or trustee may demand payment of a matured debt that is subject to a creditor's right of setoff in order to "use" the proceeds of the debt to operate the business. *Bank of America* v. *Edgins*, 36 B.R. 480, 483 (Bankr. 9th Cir. 1984). Since the proceeds (which secure the creditor's claim, 11 U.S.C. 506(a)) are considered "cash collateral" (11 U.S.C. 363(a)), the creditor may demand "adequate protection" of its interest as a condition of payment, 11 U.S.C. 363(e). See 2 Lawrence P. King et al., *Collier on Bankruptcy* § 363.02, at 363-16 (2d ed. 1994). See also *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 203-204 (1983). A debtor or trustee may force payment of a debt that is subject to

creditor's right of setoff is fully preserved in bankruptcy. *Stephenson* v. *Salisbury*, 967 F.2d 1069, 1076 (5th Cir. 1992); *B.F. Goodrich Employees Federal Credit Union* v. *Patterson*, 967 F.2d 505, 508 (11th Cir. 1992). In particular, Section 542(b) of the Bankruptcy Code specifies that a creditor who owes a debt to the debtor is *not* required to "pay" that debt to the extent that the creditor's claim represents a setoff against it. 11 U.S.C. 542(b).[2] A creditor such as petitioner cannot logically be said to have violated the automatic stay by temporarily declining to "pay" a debt that Section 542(b) specifies does not have to be paid at all.

The decision of the court of appeals in the present case failed to consider this carefully drafted scheme of interlocking provisions. By forcing the creditor to pay over the debt first and seek relief from the stay later, the decision wholly vitiates the right of setoff that Sections 553 and 542 purport to protect; a creditor obviously cannot set off a claim with a debt that it has already satisfied.

b. The automatic stay of any "setoff" under Section 362(a)(7) is not designed to defeat the ultimate right of setoff. Instead, it stays implementation of a setoff pending an "orderly examination of the debtor's and creditor's rights." *Stephenson* v. *Salisbury*, 967 F.2d at 1076. A creditor may initiate such an "orderly exam-

setoff, but only after notice and hearing at which the creditor whose claim is secured by the right of setoff may seek adequate protection. 11 U.S.C. 363(c)(2)(B). If the estate cannot provide adequate protection, the court cannot force payment to the estate. 11 U.S.C. 363(e).

[2] Section 506(a) of the Code provides further protection for the right of setoff by specifying that a creditor's claim against the debtor "is a secured claim" to the extent that it constitutes a setoff. 11 U.S.C. 506(a).

ination" by asking the court for relief from the stay.[3] 11 U.S.C. 362(d). A creditor who violates the stay by setting off the mutual debts without first obtaining the court's permission, however, may be liable for damages and attorneys' fees to any individual injured by the violation.[4] 11 U.S.C. 362(h). In concluding in this case that a creditor who seeks such an orderly determination of the right to exercise its setoff has violated the automatic stay, the court misapprehended what a "setoff" represents.

The crux of the court's ruling is that the temporary withholding of a payment on a debt constitutes a "setoff" to which the automatic stay applies. In reaching that conclusion, the court relied (Pet. App. 9-10) on its earlier decision in *United States* v. *Reynolds*, 764 F.2d 1004 (4th Cir. 1985), which in turn had relied on the reasoning of the Third Circuit in *United States* v. *Norton*, 717 F.2d 767 (1983). In *Norton*, which involved the setoff of a federal tax overpayment, the Third Circuit noted that the Bankruptcy Code neither defines the term "setoff" nor explains when a "setoff" occurs for purposes of the automatic stay. 717 F.2d at 772. The court chose to look to Pennsylvania law—rather than to federal internal revenue law—to determine when a "setoff" of federal tax liabilities occurs. *Ibid.* Applying Pennsylvania law, the court stated in *Norton* that "retention of a debtor's funds

[3] A trustee or debtor in possession also may initiate an examination of the creditor's setoff rights by seeking payment of the debt under Section 542(b) of the Bankruptcy Code, 11 U.S.C. 542(b).

[4] Under recent amendments to the Bankruptcy Code, the United States is now also liable for damages for a violation of the automatic stay. See 11 U.S.C. 106(a), as amended by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106.

by a creditor provides sufficient evidence of an intent to setoff." *Ibid.*, citing *Pittsburgh National Bank* v. *United States*, 657 F.2d 36 (3d Cir. 1981).[5] Invoking the analysis of *Norton* in *Reynolds*, the Fourth Circuit stated that it could not find any state or federal law as to when a "setoff" occurs with respect to tax overpayments. The court nonetheless elected to apply what it regarded as the "broader rationale" of *Norton* (764 F.2d at 1007):

[5] Pennsylvania applies a rule of "automatic setoff," under which a setoff is said to occur as a matter of law at the moment that the creditor's claim matures. See *Pittsburgh National Bank* v. *United States*, 657 F.2d at 38. Even if Pennsylvania law, rather than the Internal Revenue Code, were the appropriate nonbankruptcy law governing the setoff of federal tax overpayments (which we dispute, see note 6, *infra*), the Third Circuit's rationale in *Norton* would be incorrect. Under the "automatic setoff" doctrine of Pennsylvania, it is the maturation of a debt that, *by operation of law*, causes the debt "automatically" to be set off. See 657 F.2d at 38. If that reasoning were applied to a case involving taxes, a setoff could be said to occur "automatically" the instant that a tax overpayment was received. If the overpayment was received *before* bankruptcy, the setoff would be a *fait accompli* before the automatic stay ever arose and there would have been no stay violation. If, on the other hand, the overpayment was received *after* the bankruptcy petition was filed, the automatic stay would intervene to prevent the setoff from occuring "automatically" under state law. The state automatic setoff would be stayed by the federal automatic stay. No violation of the stay against setoffs could occur, at least not by operation of Pennsylvania's automatic setoff doctrine, upon which the Third purported to rely in *Norton*. Moreover, refusing to "pay" a debt for which a setoff exists is specifically authorized by Section 542(b) of the Bankruptcy Code, 11 U.S.C. 542(b), and thus cannot represent a violation of the stay against a "setoff" under Section 362(a)(7).

> If a bank could freeze the debtor's accounts upon the filing of a petition in bankruptcy, the debtor's chances for successful rehabilitation would be substantially diminished.

There are two significant defects in the reasoning applied by the Fourth Circuit in *Reynolds* and in the present case.

(i) If, as the court assumes, the term "setoff" in the Bankruptcy Code is to be defined by resort to non-Code state or federal law, the general rule is that a setoff requires (i) a decision to effectuate a setoff, (ii) an overt act accomplishing the setoff and (iii) a record of the setoff. See, *e.g.*, *Horton Dairy, Inc.* v. *United States*, 986 F.2d 286, 291 (8th Cir. 1993); *B.F. Goodrich Employees Federal Credit Union* v. *Patterson*, 967 F.2d at 513; *United States* v. *Bell Credit Union*, 860 F.2d 365, 369 (10th Cir. 1988); *Sisk* v. *Saugus Bank & Trust Co. (In re Saugus Gen'l Hosp., Inc.)*, 698 F.2d 42, 47 (1st Cir. 1983); *United States* v. *Citizens & Southern Nat'l Bank*, 538 F.2d 1101, 1107 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *Baker* v. *National City Bank of Cleveland*, 511 F.2d 1016, 1018 (6th Cir. 1975). See Paul S. Groschadl, *"Freezing" the Debtor's Bank Account: A Violation of the Automatic Stay?*, 57 Am. Bankr. L.J. 75, 76 (1983).[6]

[6] With respect to federal taxes, the Internal Revenue Code provides a federal "setoff" rule (26 U.S.C. 6402(a)):

> In the case of any overpayment, the Secretary * * * may credit the amount of such overpayment * * * against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall * * * refund any balance to such person.

Under the Internal Revenue Code, like the rule generally applicable under state law, an affirmative act—an exercise of discretion to credit and refund the balance or to refund in full—

That general rule—rather than the exceptional Pennsylvania rule relied on in *Norton*—appears applicable in Maryland, where the dispute in the present case arose. See *Barrier* v. *Marine Midland Trust Co.*, 284 A.2d 418, 424 (Md. 1971). See also note 5, *supra*.

(ii) More fundamentally, the court's suggestion that prompt payment of a setoff is desirable to enhance "the debtor's chances for successful rehabilitation" (*United States* v. *Reynolds*, 764 F.2d at 1007) simply ignores Sections 542(b) and 363 of the Bankruptcy Code. Under Section 542(b), a creditor in bankruptcy is expressly *not* required to "pay" a debt owed to the debtor if that debt may be "offset" by a claim of the creditor. 11 U.S.C. 542(b). The trustee or debtor in possession may require a claim that is subject to setoff to be paid to the estate only by providing the creditor, after notice and hearing, with alternative, adequate protection for the setoff right. 11 U.S.C. 363(c)(2)(B). See note 1, *supra*.

A creditor who is not required to "pay" a claim subject to setoff under Section 542(b) cannot be said to have acted in contempt of the automatic stay by temporarily declining to "pay" that claim while seeking judicial authorization formally to set off the debt. Merely holding the account in suspense to preserve the setoff

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must occur before a setoff has been made. Other statutes governing governmental "setoffs" similarly contemplate the taking of affirmative action to accomplish the setoff. See 31 U.S.C. 3716 ("The head of an executive or legislative agency may collect by administrative offset."); 31 U.S.C. 3728 ("The Comptroller General shall withhold paying that part of a judgment against the United States Government presented to the Comptroller General that is equal to a debt the plaintiff owes the Government [and] * * * shall discharge the debt if the plaintiff agrees to setoff * * * or * * * have a civil action brought [to establish the Government's claim].").

rights that Sections 363 and 542 of the Bankruptcy Code expressly protect does not constitute a contempt of the stay.[7]

2. The courts of appeals have splintered in their efforts to resolve the common question that this case presents. The Third and Fourth circuits (in *Norton*, *Reynolds* and in the present case) and the Eighth Circuit (in *Small Business Administration* v. *Rine-*

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[7] Freezing the debtor's account while seeking relief from the stay would not violate aspects of the automatic stay other than Section 362(a)(7). Some courts have concluded that a freeze would violate Section 362(a)(3), which stays "any act * * * to exercise control over property of the estate." 11 U.S.C. 362(a)(3). Those courts reason that the bank holds the debtor's "funds" and that the freeze deprives the debtor of his right to order disbursal of the funds. See, *e.g.*, *Patterson*, 967 F.2d at 511. That view is wrong in both of its premises. The bank does not hold funds belonging to the depositor; it owes the depositor a debt. *Barnhill* v. *Johnson*, 112 S. Ct. 1386, 1389 (1992); cf. *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1017 (1992). When the depositor files for bankruptcy relief, his *claim* against the bank, not the money in his account, becomes property of the estate. See *Bank of Marin* v. *England*, 385 U.S. 99, 101 (1966). To the extent an account freeze is an exercise of control over funds in the account, it is not an exercise of control over property of the estate. Nor is it an exercise of control over any right of withdrawal, because the debtor has no such right. To the extent the account is subject to setoff, it constitutes cash collateral. The debtor must seek court permission to withdraw the funds. *In re Lough*, 163 B.R. 586, 588 (Bankr. D. Idaho 1994).

Likewise, a freeze would not violate the stay under Section 362(a)(6) of "any act to collect [a prepetition debt]." 11 U.S.C. 362(a)(6). Because the Bankruptcy Code specifically protects setoff rights, preserving the status quo pending determination of the setoff cannot be construed as an act to collect. If it were, the provisions of Section 542(b) that specify that a debt "subject to setoff" need not be paid to the estate would be nullified. See 11 U.S.C. 542(b).

hart, supra) have held that a creditor violates the automatic stay by temporarily withholding payment of debts for which a setoff is available under state or federal law. By contrast, the Eleventh Circuit has held that a creditor does not violate the stay if, upon the debtor's demand, the creditor proceeds to the bankruptcy court, deposits the contested amount and seeks relief from the stay. *B.F. Goodrich Employees Federal Credit Union* v. *Patterson*, 967 F.2d at 511. The Fifth Circuit, moreover, has concluded that a creditor does not violate the stay by refusing a demand to pay a debt to the estate pending resolution of the creditor's right of setoff. *Stephenson* v. *Salisbury*, 967 F.2d at 1077; see also *Campbell* v. *United States*, 889 F.2d 658 (5th Cir. 1989) (court cannot sanction IRS under Section 502(d)—which authorizes disallowance of uncooperative creditor's claim—for refusing to pay debt to estate pending resolution of IRS's right to set off), cert. denied, 495 U.S. 933 (1990). Cf. *United States* v. *Inslaw, Inc.*, 932 F.2d 1467, 1472-1473 (D.C. Cir. 1991) (withholding property subject to disputed legal claims is not a violation of automatic stay; such a "view would turn every act of the possessor that implicitly asserts his title over disputed property into a violation of § 362(a) * * * creating a kind of universal end-run around the limits on turnover"), cert. denied, 502 U.S. 1048 (1992)).[8]

[8] The bankruptcy and district courts are also sharply divided in their disposition of this issue. Many courts have held that it does not violate the automatic stay for a creditor temporarily to "freeze" sums subject to offset and thereafter seek authority formally to set off the claim. See, *e.g.*, *In re Edgins*, 36 B.R. at 484; *Rio* v. *Army Aviation Ctr. Fed. Credit Union*, 82 B.R. 138, 143-144 (M.D. Ala. 1986); *Kenny's Franchise Corp.* v. *Central Fidelity Bank*, 22 B.R. 747, 748 (W.D. Va. 1982); *In re Gifford*, 174 B.R. 231, 232 (Bankr. W.D. Ky. 1994); *Moreira* v. *Digital Employees Fed. Credit Union*, 173 B.R. 965, 967 (Bankr. D. Mass. 1994); *In re Lough*, 163 B.R. at 588; *Weems* v. *United States (In re Custom Ctr., Inc.)*, 163 B.R. 309, 319 (Bankr. E.D. Tenn. 1994); *In re Briggs*, 143 B.R. 438, 445-450 (Bankr. E.D. Mich. 1992); *In re Learn*, 95 B.R. 495, 496 (Bankr. N.D. Ohio 1989); *National Bank* v. *Air Atlanta*, 74 B.R. 426, 427 (Bankr. N.D. Ga.), aff'd, 81 B.R. 724 (N.D. Ga. 1987); *Williams* v. *American Bank of the Mid-Cities*, 61 B.R. 567, 573-574 (Bankr. N.D. Tex. 1986); *Teamsters Credit Union* v. *Lee*, 40 B.R. 123, 126 (Bankr. E.D. Mich. 1984); *In re Gazelle, Inc.*, 17 B.R. 617, 620 (Bankr. W.D. Wis. 1982); *Third Nat'l Bank* v. *Carpenter*, 14 B.R. 405, 407 (Bankr. M.D. Tenn. 1981). Accord, 4 *Collier on Bankruptcy* ¶ 553.15[6], at 553-87 (15th ed. 1994). Other courts have held that a creditor's failure to pay a debt to the estate (including a bank "freeze" on the debtor's account) violates the automatic stay. See, *e.g.*, *Hudson* v. *United States*, 168 B.R. 449, 453 (Bankr. S.D. Ga. 1994); *In re Midway Indus. Contractor, Inc.*, 167 B.R. 139, 143-144 (Bankr. N.D. Ill. 1994); *In re Flynn*, 143 B.R. 798, 801 (Bankr. D.R.I. 1992); *Tavormina* v. *ITT Commercial Fin. Corp. (In re Aquasport)*, 115 B.R. 720, 722 (Bankr. S.D. Fla. 1990), aff'd, 155 B.R. 245 (S.D. Fla. 1992), aff'd, 985 F.2d 579 (11th Cir. 1993) (Table); *In re Woloschak Farms*, 74 B.R. 261, 264 (Bankr. N.D. Ohio 1987), vacated on other grounds, 109 B.R. 736 (N.D. Ohio 1989); *Executive Assoc.* v. *Southern Nat'l Bank*, 24 B.R. 171, 172 (Bankr. S.D. Tex. 1982).

This recurring conflict leads to uncertainty and wasteful litigation. The decisions to date have yielded a patchwork of inconsistent answers. This disparate treatment is especially confusing for creditors whose operations occur in more than one circuit. Moreover, in the circuits where a clear answer has not yet been provided, creditors can only speculate as to what steps—if any—they may take to protect setoff rights without violating the automatic stay.

This continuing uncertainty has particular significance for the federal government. Many federal departments, agencies and instrumentalities have national programs affected by this dispute. Agencies of the

United States that lend or collect funds, guarantee loans, enter into contracts, or distribute grants or benefits are all subject to the varying treatment that the circuits have afforded to a creditor's right of setoff. Review by this Court is warranted to resolve the continuing conflict on this common, recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

GARY R. ALLEN
GARY D. GRAY
Attorneys

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APPENDIX

1. 11 U.S.C. 362 (1988) provides in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

* * * * *

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor * * *.

* * * * *

(d) On request of a party in interest and after notice and hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or,

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

* * * * *

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

2. 11 U.S.C. 363 (1988) provides in relevant part:

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

* * * * *

(c)(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

* * * * *

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

* * * * *

3. 11 U.S.C. 506(a) provides:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

4. 11 U.S.C. 542(b) provides:

Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the

order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

5. 11 U.S.C. 553(a) provides in relevant part:

Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, * * *.